A **AMANAH RAYA CAPITAL SDN BHD**

v.

HAIRUDDIN HJ TAHIR & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: D4-22A-699-2010]
6 JUNE 2011

C ***CIVIL PROCEDURE:*** *Admission - Judgment on admission, application for - Admission on amount of debt owing through audit letter - Whether plaintiff must satisfy that admission was clear and unequivocal - Whether admission alone fulfilled evidential requirements for plaintiff to establish claim against 1st defendant - Whether plaintiff obtained judgment*
D *against 1st defendant - Rules of the High Court 1980, O. 27 r. 3*

This was an application by the plaintiff for judgment to be entered against the 1st defendant under O. 27 r. 3 Rules of the High Court 1980 ('RHC'). The plaintiff had granted a personal financing of RM3,000,000 for a term of four years to the 1st
E defendant on the basis of the Islamic principle known as Bai Al-Inah. In relation to this, the plaintiff contended that the 1st defendant had defaulted in making payments according to the facility granted to him. In the midst of preparing the demand, the plaintiff requested the 1st defendant to complete an audit letter so
F as to confirm the balance of debt which remained in the 1st defendant's account. The 1st defendant signed and confirmed the amount of RM3,042,918.82 as the balance in his account owed to the plaintiff. Thus, the said audit letter was the main basis for the plaintiff in pursuing this application for a judgment to be
G entered against the 1st defendant.

Held (allowing plaintiff's application with costs):

(1) Order 27 r. 3 RHC deals with judgment on admission of facts.
H The plaintiff must satisfy the court that the alleged admission was unequivocal, positive, clear and specific (*Perwira Habib Bank (M) Bhd v. Hj Abdullah Hj Sulaiman & Anor*; refd). (paras 12 & 14)

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(2) The 1st defendant's confirmation of the balance and his signature at the bottom of the audit letter formed an express admission that he acknowledged and admitted owing the plaintiff the sum of RM3,042,918.82. Further, there was no cogent proof to rebut the 1st defendant's admission in the said audit letter. With such admission, the court was satisfied that the plaintiff was able to obtain judgment under O. 27 r. 3 RHC. The admission alone managed to fulfill the evidential requirements for the plaintiff to establish his claim against the 1st defendant (*Global Destar (M) Sdn Bhd v. Kuala Lumpur Glass Manufacturers Co Sdn Bhd*; refd). (paras 16 & 19)

Case(s) referred to:

Affin Bank Bhd v. Successcom Enterprise Sdn Bhd [2009] 4 CLJ 764 CA ***(refd)***

Global Destar (M) Sdn Bhd v. Kuala Lumpur Glass Manufacturers Co Sdn Bhd [2004] 5 CLJ 167 HC ***(refd)***

Hasrat Usaha Sdn Bhd v. Pati Sdn Bhd [2011] 2 CLJ 863 CA ***(refd)***

Perwira Habib Bank (M) Bhd v. Hj Abdullah Hj Sulaiman & Anor [1985] 2 CLJ 489; [1985] CLJ (Rep) 639 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 27 r. 3

For the plaintiff - CK Ong (Seah Ong with him); M/s Lee Ong & Kandiah
For the defendants - Hisham Yusuf; M/s WA Wan Adnan & Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This is the plaintiff's application for judgment to be entered against the 1st defendant under O. 27 r. 3 of the Rules of the High Court 1980 ("RHC") for the amount of RM3,042,918.82.

[2] After considering the rival submissions, the court granted order in term of this application with costs fixed at RM4,000 for the plaintiff. The parties also agreed to change the 8% interest on the sum of RM3,042,918.82 to *ta'widh* (compensation fees) of 6%.

[3] The matter is now in the midst of case management for the plaintiff's claim against the 2nd-5th defendants.

Background Facts

[4] The plaintiff had granted a personal financing of RM3,000,000 for a term of four years to the 1st defendant on the basis of the Islamic principle known as Bai Al-Inah. Under this principle, at the 1st defendant's request, the plaintiff will sell to the 1st defendant an asset by way of deferred payment. The asset sale agreement was signed on 15 August 2006. The asset is a fixed deposit certificate with Certificate No: 10419582 at the sale price of RM5,400,000. This is done with the agreement that the 1st defendant will resell the said asset back to the plaintiff at a lower price on spot basis, valued at RM3,000,000 in an agreement known as the asset purchase agreement which was signed on 15 August 2006. Pursuant to the asset purchase agreement, the plaintiff duly disbursed the sum of RM3,000,000 to the 1st defendant.

[5] Before proceeding further, perhaps it would useful to say a few words about Bai Al-Inah. According to Islamic legal literature, Bai Al-Inah has normally been described as an arrangement whereby a person sells an asset to another for deferred payment. Subsequently, the seller buys back the asset from the buyer before the full payment of the deferred price, and for cash payment which is of a lesser amount than the deferred price.

[6] The two common characteristics of the arrangements of Bai Al-Inah are as follows:

(a) the sell and buy-back features; where one leg of the sale is cash and the other leg is deferred; and

(b) the cash price in one leg of the arrangement is always lower than the deferred price in the other leg of the arrangement.

(See Dr. Rabiah Adawiah Engku Ali, "Bai Al-Inah & Tawarruq: Mechanisms And Solutions", Muzakarah Cendekiawan Syariah Nusantara 2006, Bank Negara Malaysia, pp. 137-168).

[7] It is well known that the legality and validity of Bai' Al-Inah is not agreed matter among the jurist of Islam. The Shafi'i School of Islamic law legalised and validated Bai Al-Inah transactions, though some of them considered the practice as discouraged (makruh). The Syariah Advisory Council (SAC) of the Malaysian Securities Commission (SC) and the Syariah Advisory Council (SAC) of the Central Bank of Malaysia had officially endorsed Bai Al-Inah transactions in their legal rulings and resolutions.

(See for example, the resolution in Resolutions of the Securities Commission, pp. 20-22).

[8] One of the arguments raised to support their adoption of the Shafi'i's view in legalising Bai Al-Inah is public interest consideration (maslahah), ie, to overcome the problem of liquidity shortage in the country, without having to resort to conventional riba-based borrowing. The legalisation of Bai Al-Inah may also be said to be in line with the legal maxim on the lesser of two evils (akhaf al-dararayn). One of the two evils is having to resort the clear-cut prohibited riba; and on the other evil is to alternatively practice the contentious Bai Al-Inah transaction. It is thought that to take what is doubtful/contentious (shubhah) is of a lesser evil (akhaf al-dararayn) than to take what is clearly prohibited (haram).

[9] In this instant case, after several installments, the 1st defendant defaulted. The 1st defendant then requested to restructure the facility to which the plaintiff agreed. Even after restructuring the facility, the 1st defendant failed/neglected and/or refused to make payment according to the restructured facility.

[10] In the midst of preparing the demand to the 1st defendant, the plaintiff requested the 1st defendant to confirm and complete an audit letter dated 11 March 2010 to confirm the balance of debt remaining in the 1st defendant's account. The defendant signed and confirmed the amount of RM3,042,918.82 as the balance in the account owed to the plaintiff.

[11] This audit letter dated 11 March 2010 is the main basis for the plaintiff in applying O. 27 r. 3 of the RHC for a judgment to be entered against the 1st defendant.

The Law

[12] Order 27 r. 3 deals with judgment on admission of facts. For ease of reference, O. 27 r. 3 is reproduced below:

> **Order 27: Admissions**
>
> **(O. 27 r. 3)**
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> **Rule 3: Judgment on admission of facts.**
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> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

[13] Conveniently, Zulkefli Makinudin JCA (as he then was) has summarised the concept of O. 27 in *Affin Bank Bhd v. Successcom Enterprise Sdn Bhd* [2009] 4 CLJ 764 when he said:

> In an application for judgment based on admission it is a principle of law that the court has power to enter judgment against a defendant based on an admission of facts made on pleadings or otherwise under O. 27 r. 3 of the RHC 1980. However, it is not a matter of right that a plaintiff can obtain judgment based on an admission of facts under O. 27 r. 3 of the RHC 1980. The court has a discretion as to whether judgment should and such discretion is exercised depending on the circumstances of the case. (See the case of *In Re Wright Kirke v. North* [1895] 2 Ch. 747). The court will only allow judgment to be entered under O. 27 r. 3 of the RHC 1980 if there is an unequivocal admission of fact which entitles the plaintiff to enter judgment against the defendant. If liability turns on a question of law or mixed fact and law, judgment cannot be obtained. (See the case of *Perwira Habib Bank (M) Bhd v. Hj. Abdullah Hj. Sulaiman & Anor.* [1985] 2 CLJ 489; [1985] CLJ (Rep) 639). As such, if a plaintiff cannot show that all the components of his cause of action have been admitted, the plaintiff is not entitled to judgment under O. 27 r. 3 of the RHC 1980. The court will not exercise its discretion to allow judgment to be entered under O. 27 r. 3 of the RHC 1980 if there are issues to be tried or there is a defence to the action.

[14] In other words, for this application to succeed, the plaintiff must satisfy the court that the alleged admission is unequivocal, positive, clear and specific. This was enunciated by VC George J in *Perwira Habib Bank (M) Bhd v. Hj Abdullah Hj Sulaiman & Anor* [1985] 2 CLJ 489; [1985] CLJ (Rep) 639 when he said:

> The question is whether what is stated is an admission of fact and if so whether that admission entitles the applying party to a judgment or order. The admission may be implied from all the circumstances but the Court must be satisfied that it amounts to an unequivocal admission for it to pronounce judgment by the summary procedure provided by O. 27 r. 3.

(See also *Hasrat Usaha Sdn Bhd v. Pati Sdn Bhd* [2011] 2 CLJ 863).

Finding Of Facts

[15] Let us now look at the audit letter dated 11 March 2010 which forms the basis of this application. The letter is marked as MSJ6 in the plaintiff's affidavit in support of this application and is reproduced in full below:

> Letterhead: AMANAH RAYA CAPITAL
>
> Date: 11 March 2010
>
> En. Hairuddin Hj Tahir
> Topan Processing & Marketing Sdn Bhd
> No. 6 & 8, Jalan Sultan Mohamed 25/D
> Taman IKS, OKNS Bandar Sultan Suleiman
> 40300 Pelabuhan Kelang
> Selangor Darul Ehsan
>
> Dear Sir(s)
>
> For the purposes of audit we would be glad if you would complete and return THIS FORM direct to our auditors *via* fax or/and post; PricewaterhouseCoopers, P.O. Box 10192, Kuala Lumpur (A reply paid envelope is enclosed), Attention to: Ms Stefanie Tang/Ms Hazlind Shee, Fax No: (603) 2173 1288 the following information:
>
> Our books show that at December 31, 2009 the balance on your account was:

A Due by you to us RM3,042,918.82

No money received or paid by us after the date stated has been taken into account in arriving at the above figures.

Yours faithfully,

B Sgd.

.....

Confirmation

C I/We confirm that the balance shown above is correct.

Sgd.

...

(Signature & company stamp)

D In the event that you are unable to agree to the above balance please give details of the balance as shown by your records in the space below, together with any comments you may have to make:

...

E (Signature & company stamp)

...

(Signature & company stamp)

F **This Is Merely A Request For Verification And Not A Request For Payment**

Amanah Raya Capital Sdn Bhd
Tingkat 12, Wisma Amanah Raya, No. 2 Jalan Ampang, 50450 Kuala Lumpur, Malaysia
G Tel: 03-20557388 Fax 03-20557556 E-mail: crmd@arb.com.my

[16] This court is of the opinion that the 1st defendant's confirmation of the balance shown by the plaintiff and his signature at the bottom of the letter forms an express admission
H that he acknowledged and admitted to owe the plaintiff the sum of RM3,042,918.82. Had there be any different balance, the 1st defendant would have rectified the error by providing details of the balance as shown in the 1st defendant's records together with any comments as provided in the second part of the letter.

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[17] In the 1st defendant's affidavit in reply to this application, he denied all of the plaintiff's averments by raising several issues as to the validity of the contract between the 1st defendant and the plaintiff.

[18] On the issue of denying, Abdul Malik Ishak J (as he then was) has explained in *Global Destar (M) Sdn Bhd v. Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2004] 5 CLJ 167 that a mere denial by the defendant of the debt is wholly insufficient while any admission to a debt would be detrimental. If sufficient admissions are made by the defendant, then the plaintiff is entitled to apply for judgment under O. 27 r. 3 of the RHC notwithstanding the fact that the plaintiff has joined issue on the defence and has set the action down for trial.

[19] On this note, this court is of the opinion that there was no cogent proof to rebut the admission made by the 1st defendant in the audit letter dated 11 March 2010. With such admission, the court is satisfied that the plaintiff is able to obtain judgment under O. 27 r. 3 of the RHC. The admissions alone manage to fulfill the evidential requirements for the plaintiff to establish his claim against the 1st defendant.

[20] The court would like to point out that while trying the suit or other actions at law, the court is not to function helplessly in a routine manner. The primary object of a court must be to do justice between the parties according to law and where at any stage of the suit it appears that the plaintiff is entitled to the relief asked for on the basis of defendant's admission, there would be no point in delaying the judgment unnecessarily with a view to decide all controversial points in the routine manner.